

Respondent and its insurance carrier contend Judge Appling erred. They argue claimant failed to prove he injured his neck in his July 2003 accident. Accordingly,

respondent and its insurance carrier request the Board to reduce the award to one for a 13 percent disability to the left upper extremity at the shoulder level under the schedules of K.S.A. 44-510d. But in the event the Board finds claimant is entitled to receive permanent disability benefits under K.S.A. 44-510e, respondent and its insurance carrier contend claimant was terminated from his job with respondent for violating respondent's rules and procedures for handling unruly children and, therefore, claimant's permanent disability should be limited to his whole person functional impairment rating.

Conversely, claimant requests the Board to grant him a 50 percent work disability (a permanent partial general disability greater than the functional impairment rating) for a 100 percent wage loss and a zero percent task loss. In the alternative, claimant requests the Board to affirm the August 9, 2004 Award.

The only issue before the Board on appeal is the nature and extent of claimant's injury and disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Board finds and concludes:

The parties agree that claimant was injured while working for respondent on July 23, 2003, when an unruly student kicked and hit claimant. The parties also agree claimant's injury arose out of and in the course of his employment with respondent.

Respondent employed claimant, who was 72 years old at the time of the incident, for approximately seven years as an aide on a school bus for special education children. On July 23, 2003, claimant was injured when a nine-year-old boy kicked claimant's shoulders and hit him in the face, stomach, and ribs.<sup>1</sup> Claimant was taken to an emergency room where he saw respondent's company doctor, Dr. Daryl L. Thomas. At the emergency room claimant reported pain in his chest, right ribs, right hand, right hip, and pelvis.<sup>2</sup>

Later the same day, respondent terminated claimant for reasons related to the altercation. Claimant contends he was fired for grabbing and pulling the unruly child away from shards of glass the child was trying to crawl through. But according to Joseph Fugarino, who is respondent's safety and training supervisor, claimant was fired for failing

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<sup>1</sup> P.H. Trans. at 9.

<sup>2</sup> R.H. Trans. at 14-15.

to calm the child before the incident escalated to the point that the child kicked out the glass in the bus' door.

Two days after the incident claimant saw Dr. Robert Eyster, complaining of pain in his left shoulder and right hip.<sup>3</sup> Claimant next returned to the company doctor, who prescribed physical therapy.

Eventually, claimant was referred to Dr. J. Mark Melhorn, who initially saw claimant on September 8, 2003. According to Dr. Melhorn, who is a board-certified orthopedic surgeon, claimant's chief complaint was left shoulder pain. Dr. Melhorn diagnosed a tear in claimant's left rotator cuff. And on October 13, 2003, the doctor repaired the rotator cuff and decompressed the acromion.

Dr. Melhorn released claimant from treatment on December 30, 2003, and rated claimant as having a 13 percent functional impairment to the left upper extremity under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.). The doctor also concluded claimant should not lift or carry more than 50 pounds, frequently lift or carry more than 25 pounds, and limit using his left hand over the shoulder.

Dr. Melhorn's September 8, 2003 office notes indicate the doctor had x-rays taken of both shoulders and seven views of the cervical spine. Dr. Melhorn was not asked at his deposition why the x-rays were taken of claimant's cervical spine. The parties entered Dr. Melhorn's office notes into the record. Those notes do not indicate claimant had neck pain. Indeed, the pain drawings claimant completed for Dr. Melhorn in September and October 2003 indicate left shoulder symptoms only.

At his attorney's request, claimant saw Dr. Pedro A. Murati to be evaluated for purposes of this claim. Dr. Murati is board-certified in physical medicine and rehabilitation, electrodiagnosis and independent medical evaluations. At the time of the January 2004 examination, claimant's primary complaint was left shoulder pain that traveled to his neck. Dr. Murati discovered trigger points in the left shoulder girdle extending into the cervical paraspinals and limited range of motion in the cervical spine.

Dr. Murati diagnosed left shoulder pain following rotator cuff repair and decompression acromioplasty and myofascial pain syndrome at the level of the left shoulder girdle and cervical paraspinals. Using the AMA Guides (4th ed.), the doctor rated claimant as having a 24 percent functional impairment to the left upper extremity for the left shoulder injury and a five percent whole person functional impairment for a myofascial

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<sup>3</sup> *Id.* at 15.

pain syndrome in the cervical paraspinals, which combined for an 18 percent whole person functional impairment.

According to claimant, he has experienced neck pain since the accident. But claimant's medical records do not substantiate that alleged complaint. Dr. Murati diagnosed claimant as having myofascial pain syndrome and found trigger points in the muscles in the posterior of claimant's neck. But claimant's neck pain was on the side of his neck as the pain allegedly extended from his ear lobe to his shoulder.<sup>4</sup>

The Board finds claimant has failed to prove that he injured his neck in the July 23, 2003 altercation. Accordingly, claimant is entitled to receive permanent disability benefits under the schedules set forth in K.S.A. 44-510d. Averaging the functional impairment ratings to the left upper extremity provided by Dr. Melhorn (13 percent) and Dr. Murati (24 percent), the Board finds claimant is entitled to receive permanent disability benefits for a 19 percent functional impairment to the left upper extremity at the shoulder level. Accordingly, the August 9, 2004 Award should be modified.

### **AWARD**

**WHEREFORE**, the Board modifies the August 9, 2004 Award and grants claimant permanent disability benefits under K.S.A. 44-510d for a 19 percent disability to the left upper extremity at the shoulder level.

Floyd A. Newman is granted compensation from Durham School Services and its insurance carrier for a July 23, 2003 accident and resulting disability. Based upon an average weekly wage of \$215.54, Mr. Newman is entitled to receive 22.85 weeks of temporary total disability benefits at \$143.70 per week, or \$3,283.55, plus 38.41 weeks of permanent partial disability benefits at \$143.70 per week, or \$5,519.52, for a 19 percent permanent partial disability, making a total award of \$8,803.07, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

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<sup>4</sup> R.H. Trans. at 19-20.

Dated this \_\_\_\_ day of February 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant  
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier  
Marvin Appling, Special Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director